B.C.D. 01-42

Employer Status Determination
Marsh Technologies, Inc.

MAY 17 2001

This is the decision of the Railroad Retirement Board regarding the status of Marsh Technologies, Inc. (MTI), as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The following information was provided by Mr. Nicholas C. Marsh, President and Chief Executive Officer of MTI.

MTI was incorporated on October 4, 2000, and performs derailment investigations. It plans to provide assistance with derailment investigation, training in derailment investigation and in other areas for which it has technical expertise. All of its employees perform work related to rail carriers. Six percent of total business time and three percent of revenues are derived from Amtrak. MTI's work for Amtrak has consisted of performing "simulation of train impact, future training issues, derailment issues" and marketing MTI's services. Twenty percent of total business time and fourteen percent of revenues are derived from Burlington Northern Santa Fe performing "simulation of train derailments, future training issues, derailment issues" and marketing MTI's services. Six percent of total business time and twelve percent of revenues are derived from the Kansas City Southern Railroad performing "on site derailment analysis, future training issues, derailment issues" and marketing MTI's services. Ten percent of total business time and fifty-seven percent of revenues have been derived from the Association of American Railroads. MTI's work is done largely or entirely on the premises of the railroad organizations.

MTI is a privately-held corporation which is owned by Mr. Marsh and Karen Marsh. It currently has five employees.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

> (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code;
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> (ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any

> equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

MTI clearly is not a carrier by rail. Further, the available evidence indicates that it is not under common ownership with any rail carrier nor is it controlled by officers or directors who control a railroad. Therefore, the Board finds that MTI is not a covered employer under the Acts.

This conclusion leaves open, however, the question whether the persons who perform work for MTI under its arrangements with rail carriers should be considered to be employees of those railroads rather than of MTI. Section 1(b) of the Railroad Retirement Act and section 1(d) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation. Section 1(d)(1) of the RRA further defines an individual as "in the service of an employer" when:

> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and
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> (ii) he renders such service for compensation * * *.

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the RRTA (26 U.S.C. § 3231(b) and (d)).

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also with respect to the way he performs such work.

Marsh Technologies, Inc.

There is no evidence that MTI's work is performed under the direction of anyone other than MTI employees; accordingly, the control test in paragraph (A) is not met. The tests set forth under paragraphs (B) and (C) go beyond the test contained in paragraph (A) and would hold an individual to be a covered employee if he is integrated into the railroad's operations even though the control test in paragraph (A) is not met. However, under an Eighth Circuit decision consistently followed by the Board, these tests do not apply to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business. See Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953).

Thus, under Kelm the question remaining to be answered is whether MTI is an independent contractor. In this case, MTI has permanent employees and provides services to a number of different customers. In addition, MTI provides a recognized service to its customers. Accordingly, it is the opinion of the Board that MTI is an independent business.

Because MTI is an independent contractor, MTI is not a covered employer within the meaning of paragraphs (B) and (C). Accordingly, it is the determination of the Board that service performed by employees of MTI is not covered under the Acts.

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